

NEW MEXICO BROADCASTING CO.

IBLA 81-124

Decided November 24, 1981

Appeal from decision of New Mexico State Office, Bureau of Land Management, requesting payment of rental due for a television translator site NM 26436.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rent

Where a communications site right-of-way has been issued for a television translator site to provide improved television reception to a remote area, the holder of the right-of-way does not qualify for a waiver of the fair market rental as providing a "valuable benefit to the public" without charge under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(q) (1976), and 43 CFR 2803.1-2.

APPEARANCES: John R. Mahoney, Executive Vice President and General Manager of New Mexico Broadcasting Company.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

New Mexico Broadcasting Company has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated October 14, 1980, requesting payment of rental due in connection with right-of-way NM 26436 for a television translator site.

Effective August 31, 1977, the New Mexico Broadcasting Company (KGGM-TV) was granted a right-of-way for a television translator site on Caballo Mountain in the NE 1/4 SW 1/4 sec. 26, T. 15 S., R. 4 W., New Mexico principal meridian, Sierra County, New Mexico, containing a total of .27 acre, to expire August 31, 2007. The annual rental was

\$ 900 per year. The record shows that rental was paid for 2 years, August 31, 1977, to August 31, 1979.

On August 27, 1979, the New Mexico Broadcasting Company applied to BLM for an assignment of the right-of-way grant to the Hackey Ranch TV Users Association, a nonprofit organization. By decision of July 22, 1980, BLM rejected the application for assignment and requested rental of \$ 900 for the period August 31, 1979, through August 31, 1980.

Appellant responded by letter of August 21, 1980, requesting that BLM grant a waiver of rental fees pursuant to section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(q) (1976), because the company provides a valuable benefit to the public via the translator without charges. BLM subsequently rejected this request in its decision of October 14, 1980, and requested rental due in the amount of \$ 1,800 for the period from August 31, 1979, through August 31, 1981.

On appeal, appellant reiterates the arguments presented to BLM in its statement of reasons that the rental fee should be waived. It states in pertinent part:

New Mexico Broadcasting Company (KGGM-TV) installed this translator on Caballo Mountain as a public service to the residents in the Silver City and Deming areas to enable them to get better television reception from Albuquerque.

KGGM-TV paid for and installed the equipment, and has maintained the installation primarily in the spirit of rendering a public service to the citizens since the added coverage is minimal. We were not made aware that we would have to pay a commercial rental fee until after the installation was completed and in operation.

KGGM-TV does not receive any income from this translator operation. It is erroneous to compare us with cable companies or power companies because we do not charge the viewers as public utilities and cable companies charge their customers.

The source of revenue for KGGM-TV is sale of advertising time. The number of television households reached by KGGM-TV because of this translator is not sufficiently significant to warrant increasing the rates we charge advertisers for commercial time.

* * * * *

KGGM-TV did not increase advertising rates because of this translator and, indeed, would not decrease rates if this operation were discontinued.

[1] Appellant's right-of-way was granted by BLM pursuant to provisions of FLPMA, 43 U.S.C. § 1761(a) (1976), 1/ and the regulations governing right-of-way application procedures in 43 CFR 2802. Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) 2/ and the regulation in 43 CFR 2803.1-2, provide that the Secretary may waive the fair market rental where the holder of the right-of-way "provides without or at reduced charges a valuable benefit to the public." In this instance BLM has determined that appellant does not qualify for this waiver of rental based on the advice of the Field Solicitor. BLM concludes:

KGGM television is in the business of broadcasting television signals. Its profits are in the main derived from advertising. Thus, the number of potential consumers reached by KGGM determines the amount of advertising income and profits. Notwithstanding its disclaimer to the contrary, there is a sufficient connection between the total number of households viewing KGGM and advertising income to warrant the conclusion that the subject translator station constitutes an integral part of KGGM's business. Its value to the public, while praiseworthy, is not of such magnitude nor of such benign purpose that it justifies cancellation of right of way annual rental fees. Although the one translator station may only service 93 households, it is apparent that the sum total of all such stations, whether on public, private, or state lands, contributes to the profitmaking corporation.

1/ Although appellant's application was originally filed Aug. 7, 1975, under the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), before the application was approved, that Act was repealed by section 706(a) of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976), effective Oct. 21, 1976.

2/ This section specifically provides in pertinent part:

"(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest. Such rights-of-way issued at less than fair market value are not assignable except with the approval of the Secretary issuing the right-of-way. The moneys received for reimbursement of reasonable costs shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended."

From our review of the record we agree with this determination. We can find no new information or arguments presented with the appeal to persuade us that waiver of rental is justified in this case. Something considerably more than merely improved television reception is contemplated as "a valuable benefit to the public" so as to exempt a right-of-way holder from the required fair market rental in such cases. Television and cable television is available in the area. While appellant provides the improved reception of its station to viewers at no charge, it has not demonstrated that this added service is a valuable benefit to the public. As BLM has indicated, while such results are meritorious, they do not warrant cancellation of rental fees.

Although appellant disagrees with the BLM conclusion and puts forward its own point of view that it is providing a valuable benefit to the public, we find no compelling reasons for modification or reversal of the decision below. See Magic Valley Trail Machine Association, 57 IBLA 284 (1981); Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

